

Trusts not safe as houses

Bankruptcy may put your assets at risk, despite structures meant to protect them, writes **Leigh Adams**.

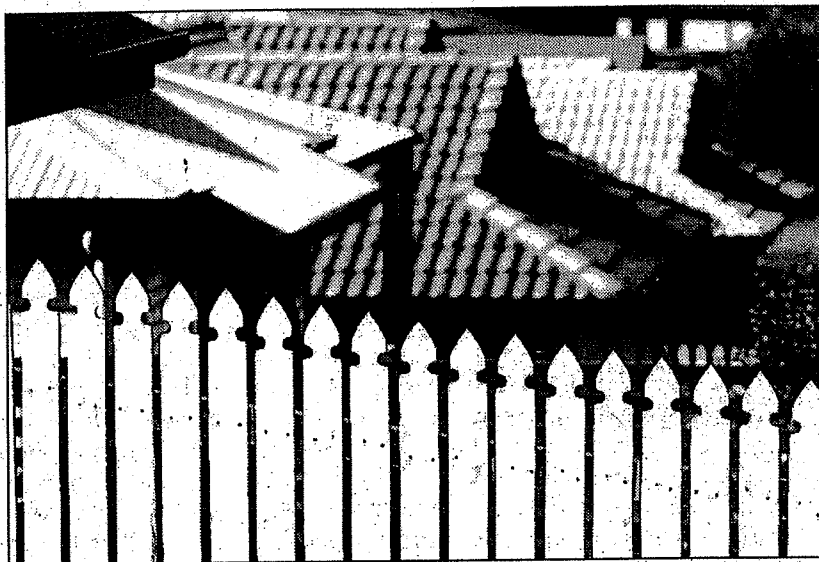
Changes to tax, bankruptcy, superannuation and family laws over the past two years – and a fundamental shift in how the High Court looks at asset protection – are worrying SME-owners, accountants, lawyers and others who try to protect their assets from creditors in the event that their businesses fail.

Last year, for example, the High Court turned decades of basic asset protection thinking on its head by declaring that husbands and wives are presumed to own their family home 50/50 regardless of whose name the house is in, who bought it and who is paying the mortgage.

Confidence in family trusts has also been undermined by the Richstar decision which, in certain circumstances, could entitle creditors to claim against the assets of a family trust if the debtor is the trustee or controls the trust, and is a beneficiary of that trust.

Recent changes have also given the clawback sections of the Bankruptcy Act more flexibility. Failure to keep adequate books and records can now create a presumption of insolvency.

In addition, parliament has tightened the operation of section 121 and now anyone who



Husbands and wives are presumed to own their home 50/50. Photo: GLENN HUNT

transfers assets to their spouse or other family members – with the main purpose of placing them beyond the reach of their creditors – can have the transfer reversed even if they have no current creditors and made the transfer only with potential creditors in mind. The section was further tightened in August 2007 when the Federal Court handed down its John Rose decision.

Furthermore, if people trade through a trust and under-pay themselves, allowing the trust to accumulate the difference to buy assets, those assets can be clawed back under recent amendments to Division 4A of the Bankruptcy Act.

An example of Division 4A's previous shortcomings involved an accountant who traded through a family trust and paid himself only \$15,000 for a year's work. The trust lent the rest of

the money to his wife who used it to pay the monthly mortgage payments over the matrimonial home (which was in her name) and other household expenses.

When the accountant went bankrupt, the trustee's action to claw back the money lent to the wife failed because Division 4A operated only at that time if the bankrupt had received a "direct benefit".

The court held the mortgage and other payments were an "indirect benefit". This drafting oversight has now been remedied.

Despite all these changes, there are still good reasons to be optimistic about asset protection strategies. Structured carefully, family trusts still offer considerable protection.

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